ORIGINAL

No. 94-8988

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTHONY LEO STUTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

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QUESTION PRESENTED

Whether petitioner's claim that the late filing of his notice of appeal was due to "excusable neglect" under Federal Rule of Appellate Procedure 4(b) should be remanded for application of the excusable-neglect standard as this Court interpreted it in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993).

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 20-21) is not reported, but the judgment is noted at 36 F.3d 94 (Table). The order of the district court (Pet. App. 23-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1994. A petition for rehearing was denied on January 24, 1995 (Pet. App. 17-18). The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Alabama to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1/] He was sentenced to 292 months' imprisonment. After his lawyer filed a late notice of appeal on his behalf, the court of appeals remanded the case to allow the district court to determine whether the delay was caused by excusable neglect. After this Court's decision in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993), but without reference to that decision, the district court found no excusable neglect. Pet. App. 23-27. By judgment order, the court of appeals affirmed. Id. at 20-21.

1. After petitioner's July 21, 1992, sentencing, petitioner's counsel prepared a notice of appeal. That notice was due to be filed on or before Friday, July 31, 1992. On Thursday, July 30, petitioner's lawyer signed a notice of appeal and directed her staff to mail it from Montgomery, Alabama, to the district court in Birmingham, Alabama. However, a substitute staff member in the lawyer's office mailed the notice of appeal to the court of appeals rather than to the district court. The court of appeals received the notice of appeal on Monday, August 3, 1992. Pet. App. 24-25.

[1/] Two other such counts were dismissed as part of petitioner's plea.

The court of appeals docketed the appeal but remanded the case to the district court for a determination whether the failure timely to file the notice of appeal was the result of "excusable neglect" under Federal Rule of Appellate Procedure 4(b). On remand, the district court requested verified evidence and arguments from the parties on the reasons for the late filing. Petitioner's brief was due by March 25, 1993, and the United States' brief was due by April 14, 1993. Pet. App. 23-24.

On March 24, 1993, shortly before the briefs were filed, this Court decided Pioneer Investment. That decision interpreted the "excusable neglect" standard in Bankruptcy Rule 9006(b)(1), governing allowance of late filings in the bankruptcy courts, as not limited to circumstances beyond counsel's control. Pioneer Investment thus authorizes courts applying an excusable-neglect standard, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." 113 S. Ct. at 1495. Neither party's brief in the district court, however, addressed the potential applicability of Pioneer Investment in this case. See Pet. App. 29-30.

On April 16, 1993, without reference to Pioneer Investments, the district court found no excusable neglect. Pet. App. 23-27. Although the factual statements in petitioner's counsel's brief were not in verified form, the district court accepted them as true. Id. at 24. The court found, however, that petitioner's lawyer did not show why the notice of appeal was not mailed until

the ninth day after final judgment was entered. Id. at 25. The district court also found that there was no showing that, if the notice of appeal had been correctly addressed, regular mail service would have delivered the notice of appeal to the district court in Birmingham on July 31, one day after it was mailed in Montgomery. Ibid.

2. On appeal, petitioner contended that the district court's decision was in error in light of Pioneer Investment. The United States responded that Pioneer Investment, which addressed the excusable-neglect standard in the context of the Bankruptcy Rules, was inapplicable in assessing excusable neglect under Federal Rule of Appellate Procedure 4(b). Gov't C.A. Br. at 11. In a judgment order making no reference to Pioneer Investment, the court of appeals affirmed.

ARGUMENT

Petitioner contends (Pet. 6-15) that the courts below erred in not assessing his claim under the excusable neglect standard enunciated in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993), and we agree. In Pioneer Investment, this Court held that excusable neglect under Bankruptcy Rule 9006(b)(1), governing late proofs of claim, is not "limited strictly to omissions caused by circumstances beyond the control of the movant." 113 S. Ct. at 1496.[1/] Rather, excusable neglect encompasses "both simple,

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[1/] Bankruptcy Rule 9006(b)(1) provides that, "when an act is required or allowed to be done within a specified period by (continued...)

faultless omissions to act and, more commonly, omissions caused by carelessness." Id. at 1495. The excusable neglect standard thus authorizes courts, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Ibid. The determination whether a party's neglect is excusable is an equitable one, and should take account of "all relevant circumstances," including "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id. at 1498.

Although Pioneer Investment arose in the context of a dispute over the correct interpretation of Bankruptcy Rule 9006(b)(1), it is equally applicable to other federal rules employing the excusable-neglect standard, including Federal Rule of Appellate Procedure 4(b), which governs the late filing of the notice of appeal in this case. Rule 4(b) provides that, where a defendant's notice of appeal in a criminal case is not filed within the required 10-day period, "[u]pon a showing of excusable neglect [the district court may * * * extend the time for filing a notice of appeal * * *." Since this Court's decision in Pioneer

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[1/](...continued)
these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time within its discretion * * * on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Investment, each of the courts of appeals that has expressly addressed the question has held the Pioneer Investment excusable-neglect standard applicable to determinations whether to extend time for filing notices of appeal under Fed. R. App. P. 4. See United States v. Clark, 51 F.3d 42, 43-44 (5th Cir. 1995) (applying Pioneer Investment to determination under Fed. R. App. P. 4(b)); United States v. Hooper, 9 F.3d 257, 259 (2d Cir. 1993) (same); Reynolds v. Wagner, No. 93-56629, 1995 WL 320020 *3-*4 (9th Cir. May 26, 1995) (applying Pioneer Investment to determination under Fed. R. App. P. 4(a)(5))[1]; City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1045-1046 (10th Cir. 1994), cert. denied, 115 S. Ct. 1254 (1995) (same); Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501, 503 (2d Cir. 1994) (same).

The Eleventh Circuit's failure to apply Pioneer Investment in this case is thus contrary to the uniform course of decisions in the other courts of appeals. The district court did not consider petitioner's excusable-neglect claim under the Pioneer Investment standard, and the court of appeals summarily affirmed without reference to Pioneer Investment. Given the unanimity of the other courts of appeals' interpretation of the "excusable neglect" standard of Fed. R. App. P. 4 in accordance with Pioneer Investment, we believe it would be appropriate to vacate the

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[1] Like Fed. R. App. P. 4(b) in the criminal context, Rule 4(a)(5) authorizes the district court to allow a late notice of appeal in a civil case "upon a showing of excusable neglect."

decision below and remand this case for reconsideration in light of Pioneer Investment.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993).

Respectfully submitted.

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Attorney

JUNE 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STUTSON, ANTHONY LEO Petitioner	)	
vs.	)	No. 94-8988
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 30th day of June 1995.

SUSAN G. JAMES
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Drew S. Days, III

DREW S. DAYS, III
Solicitor General

June 30, 1995

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